Supreme Court, U.S.
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(2)

No. 99-579

IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

Petitioners,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

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October 1999

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1812

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,

Plaintiffs-Appellees,

v.

SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 92-C-5883—Joan Humphrey Lefkow, Magistrate Judge.

ARGUED NOVEMBER 30, 1998—DECIDED JULY 6, 1999

Before FLAUM, KANNE, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The Employee Retirement Income Security Act (ERISA) prohibits certain transactions between an employee pension plan and its service providers who are deemed "parties in interest" under the Act. In this case we decide whether ERISA provides a private cause of action against a party in interest for engaging in such prohibited transactions.

In the late 1980's defendant Salomon Brothers Inc. set up financing for two motel chains, Motels of America, Inc. and Best Inns, Inc., to acquire large blocks of motel properties throughout the country. In four separate transactions the companies initially sold mortgage notes secured by the acquired properties to Salomon, who in turn sold the notes to institutional investors. In exchange for its services Salomon received a participation interest in each group of motel properties which entitled it to a percentage of the "net cash flow" generated by the properties plus a percentage of any appreciation in the properties' value.

During this same time period Salomon also provided broker-dealer services to plaintiff Ameritech Pension Trust (APT), which holds assets for Ameritech Corporation's employee pension plans. Ameritech had appointed National Investment Services of America, Inc. (NISA) to serve as investment manager to APT. In 1987 Salomon offered to sell its participation interests in the Motels of America and Best Inns motel properties to APT as an investment. After extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motel properties for over $20 million. In the early 1990's the nationwide market for hotel and motel real property collapsed, and APT suffered a considerable loss on its investment.

In 1992 APT's newly appointed trustee, Harris Trust and Savings Bank, sued Salomon (and a related company, but we can disregard that detail), seeking to hold it liable for APT's loss on the motel property participation interests. Among the 12 claims in the initial complaint were three ERISA claims relevant here: (1) a claim that Salomon was a fiduciary that had breached its duties to the plan under Title 29 U.S.C. § 1104; (2) a claim that Salomon was a fiduciary that caused the plan to engage in prohibited transactions under § 1106(a); and (3) an alternative claim that Salomon as a nonfiduciary

had knowingly participated in a breach of a § 1104 duty by plan fiduciaries.

After the plaintiffs filed suit, we held in another case, based on Supreme Court dicta, that ERISA does not provide a private cause of action against a nonfiduciary for participation in a fiduciary's breach of duty. *See Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (1994); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). This holding effectively knocked out the plaintiffs' third claim. Evidently, the plaintiffs were also fearful that the district court would find that Salomon was not a plan fiduciary, so they amended their second claim to cite Salomon for participating as a nonfiduciary party in interest in a transaction prohibited by § 1106.

Salomon moved for summary judgment on all three ERISA claims, and the plaintiffs moved for summary judgment on their § 1106 claim. As the plaintiffs had feared, Magistrate Judge Joan Humphrey Lefkow, sitting by consent of the parties, first determined that Salomon was not a plan fiduciary and found for Salomon on the first claim. As expected, she also found that the holding in *Continental Casualty* eliminated the third claim against Salomon for nonfiduciary participation in a fiduciary breach. Judge Lefkow denied summary judgment on the newly constituted § 1106 claim, however, finding that ERISA does provide a private cause of action against nonfiduciaries who participate in a prohibited transaction.

After the Supreme Court's decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), Salomon moved for reconsideration or, in the alternative, certification for interlocutory appeal on the sole remaining claim. In *Lockheed* the Supreme Court held that a § 1106 violation occurred only when a fiduciary had caused the plan to enter into the prohibited transaction. The district court declined to reconsider but granted certification for appeal of its denial of summary judgment. We review the denial of a motion for summary

judgment *de novo*. *See Hillman v. Resolution Trust Corp.*, 66 F.3d 141, 143 (7th Cir. 1995).

In a part of ERISA titled "Fiduciary Responsibility" the nature of a fiduciary's relationship to a qualified employee benefit plan is spelled out in detail. Title 29 U.S.C. § 1104 defines the duty owed:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

29 U.S.C. § 1104(a)(1). Section 1109 then makes a fiduciary personally liable for breaching this duty and describes the remedies available for a breach. Another part of the Act titled "Administration and Enforcement" provides a specific civil enforcement provision against fiduciaries who breach their duties—the Secretary of Labor, plan beneficiaries, and plan fiduciaries can sue fiduciaries for "appropriate relief under [§ 1109]." 29 U.S.C. § 1132(a)(2). ERISA also broadly allows the Secretary of Labor, plan fiduciaries, and plan beneficiaries to sue "to enjoin any act or practice which violates any provision of this title or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3). This last provision and the phrase "other appropriate equitable relief" has been the cause of much consternation in the courts.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court considered a claim by plan beneficiaries against a nonfiduciary for knowingly participating in a fiduciary's breach of duty. The nonfiduciary defendant had acted as actuary for the Kaiser Steel Retirement Plan. When

Kaiser began phasing out its steel operations a large number of employees took early retirement, and the defendant failed to change the plan's actuarial assumptions to reflect the costs of the unusually large influx of retirees. As a result, Kaiser failed to adequately fund the plan. The plaintiffs brought their action under the "other appropriate equitable relief" clause of § 1132(a)(3). The *Mertens* parties and the lower courts all assumed that § 1132(a)(3) provided a cause of action against nonfiduciaries for knowingly participating in a fiduciary breach, and the only question raised before the Supreme Court was whether money damages could constitute "other appropriate equitable relief." *See Mertens*, 508 U.S. at 251. After extensive ruminations on the nature of equity, a 5-4 majority held that money damages could not be considered equitable relief for the purposes of § 1132(a)(3).

More importantly for our purposes, Justice Scalia, writing for the majority, made clear the Court's doubts that § 1132(a)(3) provides a cause of action against nonfiduciaries for participating in a fiduciary breach because "no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." *Id.* at 254. There had been such a cause of action under the common law of trusts upon which ERISA was largely based. *See id.* Justice Scalia reasoned, however, that because Congress undoubtedly knew about the common law cause of action, it is all the more unlikely that the omission of an explicit cause of action in ERISA was inadvertent. *See id.* The "statute's . . . detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *See id.* (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)). We adopted Justice Scalia's rationale as the law of this circuit in *Continental Casualty*, 33 F.3d at 757.

On appeal, the plaintiffs have wisely abandoned their claim against Salomon for participating in a breach of fiduci-

ary duty under § 1104. Instead, they cite § 1106, which addresses "Transactions between plan and party in interest." In pertinent part, § 1106 provides:

> (a)(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> . . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan[.]

29 U.S.C. § 1106(a). Section 1106 prohibits plan fiduciaries from engaging in these transactions because they create a high potential for conflicts of interest. One example of a party in interest is "a person providing services to such plan." 29 U.S.C. § 1002(14)(B). For the purposes of our review we assume that at all relevant times Salomon was a party in interest vis-a-vis APT and that § 1106 therefore prohibited the sale of Salomon's motel property participation interests to APT (two points which Salomon reserves the right to dispute should this case go to trial). The plaintiffs argue that Salomon violated the Act by engaging in a transaction prohibited by § 1106. Therefore, the plaintiffs may seek "appropriate equitable relief," including monetary restitution, against Salomon under § 1132(a)(3).

Judge Lefkow agreed and held that § 1106 imposes a duty on nonfiduciary parties in interest to avoid prohibited transactions. This approach has found support in other circuits. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).

Our analysis begins, as it must, with the statutory language. The plaintiffs and the district court focused on the broad language of § 1132(a)(3) which allows plan fiduciaries like the plaintiffs to seek "other appropriate equitable relief" for any act which violates ERISA. The "act" alleged here is Salomon's participation in a transaction prohibited by § 1106. Therefore, if Salomon is indeed a party in interest and if it did participate in such a transaction, the plaintiffs can seek restitution for the plan's investment losses.

Salomon focuses instead on the language of § 1106 and its statutory context. Salomon points out that § 1106 by its terms only directly governs the conduct of fiduciaries ("a fiduciary . . . shall not cause . . ."), and therefore only a fiduciary can violate § 1106. Salomon's argument is strengthened when we consider the context of § 1106. Title 29 U.S.C. §§ 1101-1114 deal with "Fiduciary Responsibilities." Section 1104 describes the broad fiduciary standard of care that was required at common law, and § 1106 imposes a new statutory fiduciary duty—the duty not to cause the plan to enter into certain prohibited transactions. Section 1109 makes the fiduciary and only the fiduciary liable for breaches of the duties described in the "Fiduciary Responsibility" part of the Act. Finally, Section 1132(a)(2) provides a private right of action for appropriate relief under § 1109.

In *Mertens* Justice Scalia reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under § 1104 there was no such cause of action. The same logic applies to § 1106 because it simply describes another variety of fiduciary breach. Nothing explicitly makes nonfiduciaries liable for participating in a breach of that duty. The plaintiffs place great weight on the fact that § 1106 mentions "parties in interest," but the fact of the matter is that the section, by its plain terms, does not regulate their conduct. Therefore, § 1106 imposes no explicit duty on parties in interest. In *Continental Casualty* we adopted Justice Scalia's position

that where ERISA does not expressly impose a duty, there can be no cause of action. There seems to be no material distinction between that case and this.

In *Continental Casualty* the fiduciaries of a union pension fund obtained a one-year extension of their fiduciary liability insurance policy. The extension cost $750,000 and provided additional coverage of only $1 million. Entering into such a bad deal was a clear breach of fiduciary duty under § 1104. The Department of Labor sought relief for the plan against the fiduciaries under § 1109 and § 1132(a)(2). It also sought restitution from the insurance company which had participated in the fiduciaries' breach. The Labor Department argued that this was appropriate equitable relief under § 1132(a)(3). Relying on *Mertens*, we denied the claim against the insurance company because neither § 1104 nor § 1109 explicitly imposed liability on nonfiduciaries. Section 1132(a)(3) as a remedial statute only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act.

The same logic applies to this case. Section 1106 falls under the "Fiduciary Responsibility" part of the Act, and § 1109 makes fiduciaries liable for violating § 1106. The mere fact that § 1106 mentions "parties in interest" when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction.

The only viable distinction the plaintiffs raise between the position of participating parties in interest under § 1104 and participating parties in interest under § 1106 is that one of the Act's remedial provisions imposes civil penalties on parties in interest when they participate in a transaction prohibited by § 1106: "In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary [of Labor] may assess a civil penalty against such party in interest." 29

U.S.C. § 1132(i). The fact that Congress saw fit to allow the Labor Department to impose such a penalty, however, only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking. Section 1132(i) allows the Labor Department to impose a civil penalty of up to 5 percent of the value of the transaction if the party in interest is willing to "correct" the transaction in a manner prescribed by the Department. If the party in interest refuses to correct the transaction, the penalty can be increased to 100 percent of the transaction amount. The Supreme Court in *Mertens* determined that Congress did not intend to impose civil liability on parties in interest for participating in a breach of fiduciary duty because ERISA does not contain an explicit statement of nonfiduciary participation liability. Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction. Section 1132(i) does provide a penalty against such parties in interest, but that penalty is imposed solely at the discretion of the Labor Department. If Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of cofiduciaries. *See* 29 U.S.C. § 1105.

The plaintiffs cite language in *Mertens* which they believe supports their position that parties in interest are liable for participation in prohibited transactions. In *Mertens* Justice Scalia suggested that "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . and (assuming nonfiduciaries can be sued under [§ 1132(a)(3)]) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees." *Mertens*, 508 U.S. 248, 262. This language, however, does not get the plaintiffs as far as they would like. First, the statement that professional

service providers like Salomon must disgorge assets and profits gained from a § 1106 transaction is unremarkable. As discussed above, § 1132(i) forces parties in interest to correct such transactions at peril of a Labor Department penalty.

Second, Justice Scalia's remark that "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" must be understood in the context of the unique posture of the case the Supreme Court had before it. The parties and lower courts in *Mertens* had all assumed that § 1132(a)(3) provided relief against nonfiduciaries for participation in a fiduciary breach. Therefore, the Supreme Court was asked to determine only whether damages could be considered "appropriate equitable relief." A majority of the Court, however, expresses strong doubts as to whether there even was a cause of action under § 1132(a)(3) against nonfiduciaries. *See Mertens*, 508 U.S. at 254-55. The Court then proceeded to decide the issue of whether damages could be equitable, technically leaving open the issue of whether § 1132(a)(3) provided a cause of action against nonfiduciaries. Thus, the parenthetical phrase "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" was stating a big assumption—an assumption Justice Scalia had previously made clear that he and a majority of the Court were unwilling to make. Justice Scalia's reasoning is now the law of this circuit, and the "assuming" language can no longer support the plaintiffs' reading of the statute.

Both parties also cite the more recent Supreme Court decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), to support their respective positions. Salomon cites the case for the proposition that only fiduciaries can be held liable under § 1106. In *Lockheed* the plaintiff beneficiary sued his employer, the plan sponsor, for engaging in a transaction prohibited by § 1106. The Ninth Circuit held that the plan sponsor in this case was not a fiduciary but was still liable as a party in interest under § 1106. The Supreme Court reversed. Justice Thomas, writing for a unanimous Court, held that proof that a fiduciary caused the plan to enter into

the prohibited transaction was a necessary predicate to § 1106 liability. *See id.* at 891. Once the Court had determined that the defendant sponsor was not a fiduciary, there was no other potential fiduciary to cause the transaction. However, Justice Thomas also seemed to leave open the possibility that a nonfiduciary party in interest could be held liable for a prohibited transaction if a fiduciary caused the plan to enter into the transaction:

> The Court of Appeals thus was not necessarily wrong in saying that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA"; but the only transactions rendered impermissible by [§ 1106] are transactions caused by fiduciaries.

See id. at 889 n.3. The plaintiffs seize on this rationale to support their argument that nonfiduciaries are liable under § 1106, but the opinion really provides no guidance one way or the other. "Not necessarily wrong" does not mean "right." Furthermore, Justice Thomas went out of his way to point out that the passages from *Mertens* that the Ninth Circuit relied on in finding that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA" were dicta. *See id.* At most, the "not necessarily wrong" statement makes it clear that in *Lockheed* the Court was once again not addressing the issue of party-in-interest liability under § 1106. Such liability was still an open question after *Lockheed* as far as the Supreme Court was concerned.

The plaintiffs also find support for their reading of § 1106 in ERISA's legislative history. A Congressional Conference Committee Report suggests that § 1106 would prohibit "plan fiduciaries and parties in interest" from engaging in the listed transactions, implying that both parties to the transaction would be liable. H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5087. But Salomon's analysis of the legislative history is more

convincing. The Senate and the House of Representatives both passed versions of ERISA. The House bill did not explicitly impose liability on nonfiduciaries; the Senate bill did:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay the fund any profits realized by him from such transaction.

H.R. 2, 93rd Cong., 2d Sess. § 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) (not enacted), reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3780 (1976). The Conference Committee staff charged with reconciling the House and Senate versions specifically recommended dropping the party in interest liability provision. Summary of Differences Between the Senate Version and the House Version of H.R. 2—To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93rd Cong. Sess. (1974), *id.* at 5259. And Congress did so when it passed the final bill into law. While we hesitate to give too much weight to legislative history, this record suggests that Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so.

Whether there is a private cause of action against nonfiduciary parties in interest under § 1106 is a difficult issue. As we have noted, at least three other circuits have found such a cause of action. Ultimately, the dicta in *Mertens* adopted by this court in *Continental Casualty* provides the most guidance. Applying Justice Scalia's rationale to § 1106, we do not think it imposes liability on nonfiduciary parties in interest any more than § 1104 does. Like § 1104, § 1106 comes under the heading "Fiduciary Responsibility."

The plaintiffs argue that because it is entitled "Prohibited Transactions" § 1106 regulates the conduct of all parties to the transaction. The prohibitory language of the section itself is clear, however: "fiduciaries shall not . . . ." Causing a qualified plan to engage in one of these transactions is simply another species of fiduciary breach. A nonfiduciary cannot violate § 1106 and therefore cannot be liable under § 1132(a)(3) for participating in a § 1106 transaction. Section 1132(i) provides the only express penalty against nonfiduciary parties in interest who participate in a fiduciary's breach of his or her responsibility under § 1106. The Supreme Court has repeatedly stated its reluctance to infer ERISA causes of action where the statute does not expressly provide for them, and we decline to do so here.

With all due respect to the circuits[1] who have considered this issue, we find no convincing reason to distinguish § 1106 from § 1104 for the purposes of nonfiduciary liability. The decision of the district court is therefore reversed and summary judgment is granted to Salomon Brothers.

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[1] Because this opinion creates a circuit split, it has been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e). Judge Coffey did not participate in the circulation due to a conflict. All other judges voted not to rehear the case en banc except Judge Ripple who voted to grant rehearing en banc.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION and JOHN A. EDWARDSON, Plaintiffs,	)	
vs.	)	No. 92 C 5883
SALOMON BROTHERS, INC. and SALOMON BROTHERS REALTY CORP., Defendants.	)	

MEMORANDUM DECISION

Joan H. Lefkow, Magistrate Judge:

Plaintiffs, Harris Trust and Savings Bank, as Trustee for Ameritech Pension Trust ("APT"), Ameritech Corporation ("Ameritech") and John A. Edwardson, seek recovery from Salomon Brothers, Inc. and Salomon Brothers Realty Corporation (collectively "Salomon") for alleged violations of various provisions of the Employee Retirement Income Security Act ("ERISA") and several state laws. Salomon has filed two counterclaims seeking contribution from Ameritech. Both sides have filed motions for summary judgment with respect to portions of the Second Amended Complaint ("complaint"): cross motions are pending with respect to count II which alleges liability based on Salomon's participation in transactions that are prohibited under ERISA, and

Salomon further seeks summary judgment with respect to counts I and III of the complaint which allege other ERISA violations.[1] Plaintiffs in turn seek summary judgment on Salomon's counterclaims.

PROCEDURE ON SUMMARY JUDGMENT

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine issue of fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions and affidavits that are part of the record. Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, (1986). It may meet this burden without coming forward with affirmative evidence to negate the nonmovant's claim if it can show the absence of evidence that would support an essential element of the nonmoving party's case. *Id.*, 106 S. Ct. at 2552-53. In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing

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[1] The court previously dismissed counts IV through VII, XI and XII of the complaint. *See Harris Trust and Savings Bank v. Salomon Brothers, Inc.*, 832 F. Supp. 1169 (N.D. Ill. 1993)(Aspen, J.). As a result, only counts I through III (the ERISA claims) and counts VIII through X (the state law claims) remain at issue. Although Salomon has separately moved for summary judgment with respect to the state law claims, the parties have agreed to defer briefing that motion until after this decision with respect to the federal claims. Also pending are Salomon's motions to strike certain evidentiary items that plaintiffs have offered in support of their motion regarding count II and in opposition to Salomon's motion on the federal claims.

that there is a genuine issue for trial. *Id.* at 324, 106 S. Ct. at 2553. A material fact must be outcome determinative under the governing law. *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991).

Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983), the non-moving party's evidence is to be believed and all reasonable inferences from the facts must be viewed in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984). Because plaintiffs and defendants have filed cross motions with respect to count II, the court must rule on each party's motion individually, determining in each case whether judgment may be entered in accordance with the standard set forth in Rule 56. *Wausau Ins. Co. v. Valspar*, 594 F. Supp. 269, 270 (N.D. Ill. 1984).

FACTUAL BACKGROUND[2]

Ameritech sponsors and administers two pension plans, which qualify as employee pension benefit plans under ERISA. The plans are funded through APT, for which Harris is a directed trustee. Edwardson was a member of Ameritech's Asset Management Committee, the committee which Ameritech has authorized to act for the company in managing and administering APT. Each plaintiff is a fiduciary of APT within the meaning of ERISA.

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[2] Additional factual detail surrounding the transactions at issue can be found in Judge Aspen's two prior opinions in this matter. *See* 832 F. Supp. 1169 (N.D. Ill. 1993) and 813 F. Supp. 1340 (N.D. Ill. 1992). The court has assumed the reader's familiarity with those decisions. Moreover, because of the variety of legal issues involved, a significant number of facts are addressed as needed in the following sections.

During the relevant time period, Ameritech, through its Asset Management Committee, appointed National Investment Services of America, Inc. ("NISA") to serve as the investment manager for APT's dedicated bond fund ("DBF") and, as a result, delegated investment decisions concerning the assets within that portfolio to NISA.

Salomon Brothers, Inc. is a Delaware corporation engaged in the business of investment banking and underwriting securities. At the time at issue herein Salomon Brothers, Inc. had expertise and experience related to the hotel industry. Salomon Brothers Realty Corp. is a New York corporation which is affiliated with Salomon Brothers, Inc. Both corporations are owned by Salomon Brothers Holding Company, Inc. During the 1980's and thereafter, Salomon served as a broker-dealer on numerous debt and equity transactions for the plans whose assets APT holds.

On three separate occasions in 1987, 1988 and 1989, Motels of America, Inc. ("MOA") acquired various motel properties pursuant to financing set up by Salomon. Essentially, MOA issued mortgage notes secured by the motel properties and Salomon acting as principal, purchased all the notes for later resale to various institutional investors. At the closing of each of these transactions, MOA paid Salomon for its services. A portion of the fee was in cash and MOA also entered into a written fee agreement which gave Salomon certain rights to participate in the net cash flow, sale or refinancing proceeds, and property appreciation associated with the motel properties that MOA had acquired ("Fee Agreements I-III"). In October 1989, Best Inns, Inc. acquired nine hotel properties pursuant to a similar financing plan arranged by Salomon. At the closing of the transaction, Best Inns and Salomon also entered into a fee agreement ("Fee Agreement IV").

In 1987, Salomon offered to sell APT its interest in Fee Agreement I. Negotiations ensued in which Salomon pro-

vided a confidential offering memorandum and advocated the fee agreement as an appropriate and advantageous investment for APT. At some point, either Ameritech or NISA, acting in its capacity as investment manager, requested that Salomon retain a partial interest in the Fee Agreement. This request was made because NISA lacked the ability to evaluate MOA on a continuing basis and it wanted to take advantage of Salomon's claimed expertise in this area. In effect, there was a desire to keep Salomon's interests aligned with APT's to ensure that Salomon would continue to receive and evaluate information relating to the soundness of the Fee Agreement as an investment and to encourage Salomon to provide continuing advice regarding the investment to APT. Plaintiffs have submitted evidence that, as part of the transaction, Salomon in fact orally agreed to monitor MOA's and Best Inn's financial performance for APT/NISA and to provide information regarding that performance on an on-going basis.[3] On October 28, 1987, APT purchased 95% of Salomon's interest in Fee Agreement I. In 1988, after Salomon received Fee Agreement II, Salomon approached APT/NISA to purchase an interest in it. APT purchased 100% of Fee Agreement II.

In fall of 1989 Salomon again approached APT about purchasing an interest in Fee Agreement III. Salomon failed, however, to pass on certain adverse information concerning the performance of the underlying MOA properties, as well as adverse developments affecting the value of Fee Agreements I and II. On December 22, 1989, APT purchased 95% of Salomon's interest in Fee Agreement III and, on that same

[3] The parties dispute the existence of any alleged oral agreement to monitor the Fee Agreements. Even if it did engage in monitoring activities, Salomon further disputes whether it was acting in its own interests or on behalf of APT.

day, purchased 95% of Salomon's interest in Fee Agreement IV relating to the Best Inns properties.

The purchase of each participation interest in the Fee Agreement was effected pursuant to a written Assignment. Each Assignment sets forth the percentage interest to be assigned and the amount to be paid in consideration for the assignment and transfer of that interest. It also sets forth certain representations and warranties of the assignor and assignee. One of the APT's representations was that APT had "conducted an independent investigation of [MOA or Best Inns]" and that APT "has not relied upon any representation or warranty . . . by [Salomon] . . ., except as expressly set forth in Section 3 of this Assignment." The Assignment further contains an integration clause providing

> This assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

Plaintiffs further submit that during negotiations for and after the closing of the Fee Agreement transactions, Salomon made numerous falsely positive representations regarding MOA and Best Inns. Salomon also failed to disclose information regarding performance declines and other facts which would have alerted plaintiffs to the precarious condition of the investments. Thus, despite Salomon's representations to the contrary, the Fee Agreements were virtually worthless. Both MOA and Best Inns are bankrupt.

ANALYSIS

ERISA is a comprehensive statute designed to protect employee benefit plans. In furtherance of its goals, statute designates certain parties as plan fiduciaries, 29 U.S.C. § 1002(21), and imposes personal liability on them for any injury to the plan resulting from a breach of their fiduciary duties. 29 U.S.C. § 1109(a). ERISA also designates other persons as "parties in interest" and specifically prohibits plan fiduciaries from engaging in certain transactions with parties in interest. *Id.* § 1106. Section 1132 then sets forth a variety of enforcement provisions describing the circumstances under which the Secretary of Labor, as well as plan participants, beneficiaries and fiduciaries, may initiate civil actions to redress violations of the act.

Count I

In count I, plaintiffs allege that Salomon is a fiduciary of APT within the meaning of ERISA § 1002(21) and that Salomon's sale of the Fee Agreement participation interests to APT, as well as Salomon's failure to subsequently monitor the investment breached fiduciary duties that Salomon owed to APT. Salomon contends that plaintiffs have failed to offer any admissible evidence that Salomon was a fiduciary of APT and, further, that the undisputed evidence establishes that it was not such a fiduciary.

A person will be deemed to be a fiduciary with respect to an ERISA plan

> to the extent that (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . .

29 U.S.C. § 1002(21)(A). In keeping with ERISA's remedial goals, the courts liberally construe the word "fiduciary" to be more rather than less inclusive. Whether a person qualifies as a fiduciary must be judged according to objective standards. *Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 291-92 (7th Cir. 1989). If the requirements of the statute and the regulations promulgated thereunder are met, it makes no difference whether the parties involved subjectively believe that a fiduciary relationship exists. *Id.* Although plaintiffs claim that Salomon qualifies as a fiduciary under both statutory definitions, evidence that Salomon fits within either definition is sufficient to prevent entry of summary judgment against plaintiffs. As a result, the court will separately consider the two standards.

a. Discretionary Authority or Control

Plaintiffs contend that summary judgment is inappropriate because there is a question of fact whether Salomon had discretionary authority or control respecting the management of a portion of APT's assets. In support of this contention, plaintiffs point to evidence that before NISA decided to invest APT's assets in the Fee Agreements, NISA sought and obtained Salomon's oral agreement to continually monitor the investments' performance on behalf of APT/NISA and NISA required Salomon to retain a 5% interest in three of the four Fee Agreements. Plaintiffs' evidence indicates that NISA insisted on these conditions to insure that Salomon's interest would be aligned with APT's interest and, therefore, "Salomon would provide NISA/APT with whatever information or decisions it needed." *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 14. In short, NISA believed it lacked the ability to evaluate the fee agreements on an ongoing basis and wanted to take advantage of Salomon's claimed expertise in the area. Salomon responds that any evidence relating to an alleged oral agreement to monitor is barred by the parol evi-

dence rule, but even if such an agreement existed, it did not provide Salomon with the type of discretionary control over APT's assets that creates a fiduciary relationship within the meaning of ERISA § 1002(21).

In *Farm King*, the Seventh Circuit pointed out that the cases finding a fiduciary relationship based on discretionary control over the management of an employee benefit plan or its assets had a common theme, namely, "the authority to exercise control unilaterally over a portion of a plan's assets, not merely to propose investments." *Farm King*, 884 F.2d at 292. There, the court concluded that a brokerage firm did not have the requisite discretion despite evidence that over the course of four years, the brokerage firm's representatives had had complete discretion in selecting and presenting securities to the plan, the firm had made recommendations regarding various investments and the plan's trustees had purchased securities almost exclusively from the brokerage firm. *Id.* The lesson of *Farm King* is that "discretionary control" requires something more than influential advice, it requires proof that an alleged fiduciary actually exercised some amount of decision-making power with respect to the plan's assets or had the authority to do so. *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991). While proof that the plan has specifically delegated decision-making authority to the alleged fiduciary is not required, there must, at a minimum, be some indication that the alleged fiduciary's influence has so transcended normal bounds that it effectively has caused the plan's trustees to abdicate their independent decision-making powers to the alleged fiduciary. *See e.g., Schloegel v. Boswell*, 994 F.2d 266, 271 (5th Cir. 1993); *Reich v. McManus*, 883 F. Supp. 1144, 1149 (N.D. Ill. 1995)(summary judgment inappropriate where plan trustees had stated that all investment decisions were based exclusively on broker's advice and broker had noticed at least one trustee that the trustees had to follow his advice or find a new consultant). In other words, there must be evidence that the

alleged fiduciary is effectively acting for the plan. *Associates in Adolescent Psychiatry v. Home Life Insurance Co.*, 941 F.2d 561, 570 (7th Cir. 1991).

Here, the evidence of Salomon's influence, taken in a light favorable to plaintiffs, fails to rise to the requisite level of control. Even assuming Salomon's alleged oral agreement to monitor the fee agreement is admissible,[4] nothing indicates that information from Salomon was or was intended to be the exclusive basis of NISA/APT's investment decisions. To the contrary, a review of plaintiff's evidence in this regard reveals that Salomon was to provide information not otherwise available to NISA but that NISA understood that there was a need for skepticism with respect to the information because as buyer and seller their interests were at odds. Indeed, those adverse interests are one of the reasons that NISA wanted Salomon to retain an equity interest in the investments — to increase the reliability of the information received by aligning Salomon's interests with that of APT. In a telling comment, Joseph Gorman, president of NISA, testified that "[i]n the last analysis, [NISA] had to independently assess whether [the Fee Agreements] ought to come into the portfolio. But in doing that we relied upon expertise that was other than our own; and that would be primarily Salomon, secondarily Ameritech." While it is clear that Salomon's advice was to be influential, it is also evident that neither APT or NISA had relinquished discretionary authority to Salomon.

Although, plaintiffs assert, Mr. Gorman also testified that Salomon was to "bring [NISA] whatever information or *decisions* we needed" (emphasis added), a review of the actual testimony reveals that Salomon was to follow the investment and report to NISA as required, thereby providing

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[4] Whether evidence of the oral agreement is admissible is addressed in the next section.

NISA/APT with useful information and apprising NISA/APT of decisions that NISA/APT needed to make.[5] As an example of the way in which the parties were to operate, Mr. Gorman stated, "if there was a choice to be made representing our part of the investment, that we be presented the choice and we would make the choice." Gorman Dep. at 350.

Despite plaintiffs' contention that Salomon's claimed expertise in the area of these real estate investments made Salomon's advice especially influential, influence over the trustees' investment decisions does not amount to effective control over plan assets. While persons who render advice to a plan may play influential roles by virtue of the expertise they possess or the capacities in which they act, to be a fiduciary such persons must exercise what amounts to actual decision-making power. *Reich v. Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995); *Schloegel*, 994 F.2d at 271. Based on this record, it appears that Salomon's relationship to APT

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[5] More fully, Mr. Gorman stated,

> When we were clarifying roles and understandings about who would do what with respect to the MOA investment, [NISA] relied upon the fact that Salomon was [MOA's] investment banker, that [Salomon] had access to information that otherwise would not be available to us. And that as partners in the ownership of [the fee agreements], [Salomon] would follow it closely, appraise us of those things that affected our interest and bring to us whatever either information or decisions we needed to — most especially having to do with the closing, with the appraisal at the end where we would — where Ameritech would get out of their investment.

Gorman Dep. at 606-07. Even construing this testimony in a light favorable to plaintiffs, it is unreasonable to infer that Salomon was to be the decisionmaker.

was more akin to the relationship at issue in *Farm King* , where the broker periodically made presentations regarding the performance of prior investments and recommended courses of action with respect to both prior and future investments; the actual investment decisions, however, were left to the trustees. There is no evidence that Salomon, assuming it agreed to monitor the investments, did more. NISA remained free to reject any advice or information received from Salomon and there is no evidence that it ever purposefully or effectively surrendered that freedom. On this record, then, Salomon does not qualify as a plan fiduciary within the meaning of § 1002(21)(A)(i).

b. Rendering Investment Advice

Plaintiffs alternatively argue that Salomon is a fiduciary within the meaning of § 1002(21) because it was paid to provide investment advice regarding APT's money or property. *See* 29 U.S.C. § 1002(21)(A)(ii). To assist in deciding whether a person qualifies as an investment advisor fiduciary, the Department of Labor ("DOL") has promulgated regulations explaining that a person shall only be deemed to be rendering "investment advice" to an employee benefit plan if

> (i) such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) such person either directly or indirectly . . .
>
> (A) has discretionary authority or control, whether pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
>
> (B) renders any advice . . . on a regular basis to the plan pursuant to a mutual agreement, arrange-

> ment or understanding, written or otherwise, between such person and the plan . . . that such services will serve as a primary basis for investment decisions . . . and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

29 C.F.R. § 2510.3-21(c)(1). The parties seem to agree that Salomon provided NISA/APT with information or recommendations that would satisfy subsection (i) of the DOL regulation. Their dispute centers on whether there is evidence satisfying the requirements of subsection (ii)(B).[6] Salomon contends that there is no admissible evidence of a mutual agreement or understanding that Salomon would provide advice that would serve as the primary basis for APT's investment decisions. Moreover, even if the there was a mutual understanding, Salomon contends that it received no fee or compensation for any alleged investment advice. Plaintiffs, of course, disagree.

The starting point for the analysis is whether there is adequate evidence to establish the existence of a mutual understanding between Salomon and NISA/APT to the effect that Salomon's advice would serve as the primary basis for NISA/APT's investment decisions. *Farm King*, 884 F.2d at

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[6] Plaintiffs also contend that Salomon qualifies as an investment advisor fiduciary under subsection (ii)(A), but as courts have recognized, subsection (ii)(A) of the DOL regulation is essentially an overlap of ERISA § 1002(21)(A)(i). *Olson v. E.F. Hutton & Co., Inc.*, 957 F.2d 622, 626 (8th Cir. 1992). As discussed above, there is no evidence that Salomon exercised discretionary control with respect APT's participation interests. Subsection (ii)(A) of the DOL regulations is not satisfied.

293. Again, plaintiffs rely on testimony and other evidence indicating that before the Assignments were executed, NISA sought and obtained Salomon's oral agreement to monitor the fee agreements and provide NISA/APT with the information necessary to make appropriate investment decisions. While insufficient to establish discretionary control over APT's assets, such pieces of evidence might raise a question of fact as to whether the requisite mutual understanding existed. Nevertheless, the court need not decide that issue because, as Salomon points out, the assignment of the participation interests was effected through an integrated written contract and, therefore, the parol evidence rule renders proof of the alleged oral agreement legally inadmissible.

Under New York law,[7] parol evidence is not admissible to vary or contradict the terms of a written agreement where the writing expresses the entire agreement of the parties, i.e., it is integrated. *Stroll v. Epstein*, 818 F. Supp. 640, 645 (S.D.N.Y. 1993). Here, each Assignment appears to be complete on its face and expressly provides that the written contract constitutes the entire agreement between the parties. *Id., citing, Happy Dack Trading Co., Ltd. v. Agro-Industries, Inc.*, 602 F. Supp. 986, 991 (S.D.N.Y. 1984) (a contract is integrated as a matter of law if it appears complete on its face). The Assignments are otherwise unambiguous and

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[7] Each Assignment transferring a percentage of Salomon's interests in the Fee Agreements provides that the Assignment will be governed by New York law. Because the parol evidence rule is substantive, not procedural, this court must look to the appropriate state law for guidance. As a federal court sitting in diversity, the court must apply the choice of law rules of the state in which it sits. Because Illinois will honor a contractual choice of law provision absent certain conditions not present here, the court must apply New York law in interpreting the Assignments. *Janice Doty Unlimited, Inc. v. Stoecker*, 697 F. Supp. 1016, 1019 (N.D. Ill. 1988).

make no reference to a separate agreement to monitor. While acknowledging the general contours of the parol evidence rule, plaintiffs argue that ERISA § 1110(a)[8] overrides the rule or preempts its application under circumstances like those presented here. They reason that relying on the Assignments' integration clause to preclude evidence of Salomon's fiduciary status is tantamount to using that provision to relieve Salomon of its fiduciary responsibilities. This argument is not persuasive. Assuming admissible evidence established that Salomon was an ERISA fiduciary, the integration clause would not relieve Salomon of any responsibility or liability attendant with that status. The parties merely agreed to limit their respective roles to that which is set forth in the Assignments. Whatever liability or responsibility follows from those roles remains unlimited. The Seventh Circuit has recognized the importance of this distinction. In a case where a contract vested one party with sufficient discretionary authority to be deemed an ERISA fiduciary, the court stated that despite ERISA § 1110(a) parties may contractually decide how much authority to vest in a person (potentially precluding a finding of fiduciary status), but they may not decide how much liability attaches to the exercise of that authority if the authority so bestowed makes that person a fiduciary. *Chicago Bd. of Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 259 (7th Cir. 1983). In short, § 1110(a) is inapplicable.

Plaintiffs also argue that proof of the monitoring agreement is admissible because it was a condition precedent to the assignment of Salomon's interests in the Fee Agreements.

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[8] This section provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a).

New York law does permit the use of parol evidence to establish a condition precedent that precludes the legal effectiveness of the contract absent the occurrence of the condition, but only if the condition does not contradict the terms of the writing. *Hicks v. Bush*, 10 N.Y.2d 488, 180 N.E.2d 425, 427 (N.Y. 1962). Thus, despite plaintiffs' evidence that NISA would not have proceeded with the transaction absent the monitoring agreement, evidence of the alleged oral agreement is barred. It directly contradicts the terms of the Assignments which state that there are no other agreements between the parties other than those set forth therein. In other words, the language of the Assignment indicates that, unless otherwise set forth therein, the purchase and sale was unconditional. In a similar situation, an alleged oral condition to the effectiveness of a guaranty was found to be not proveable as a matter of law. *See Bank Leumi Trust Co. of New York v. Wulkan*, 735 F. Supp. 72, 77-78 (S.D.N.Y. 1990)(alleged oral agreement that effectiveness of guaranty was conditioned upon guarantor obtaining permission from proper governmental authorities). Plaintiffs' position may be better characterized as an intent to purchase Salomon's alleged agreement to monitor in addition to the participation interests. While NISA may not have intended to proceed with the transaction without this additional consideration, the alleged oral agreement is not a condition precedent in the sense that nonoccurrence of the condition precludes enforcement of the contract. The purchase and sale of the participation interests took place in accordance with the written Assignments; parol evidence cannot now be permitted to vary the terms of the sale.

Plaintiffs next argue that proof of Salomon's representations that it would monitor the fee agreement investments is admissible because a general merger clause is ineffective to exclude parol evidence to show fraud in the inducement of a contract. Although plaintiffs are correct that New York law does permit the introduction of parol evidence to prove alle-

gations of fraud, the introduction of the alleged agreement to monitor for this purpose would not materially advance plaintiffs' claim that Salomon is an investment advisor fiduciary. Proof that Salomon induced NISA to invest in worthless instruments by making fraudulent promises to monitor does not establish the mutual agreement that is essential to proving Salomon's status as an investment advisor fiduciary. To the contrary, it would suggest that there was no mutual agreement. While such evidence would be relevant to a claim that Solomon committed fraud, it is insufficient to establish the requisite contractual meeting of the minds. Plaintiffs have failed to offer admissible evidence of a mutual understanding between NISA and Salomon that Salomon would regularly provide investment advice which would serve as the primary basis of NISA/APT's investment decisions. In light of this conclusion, it is not necessary to consider whether Salomon received a fee or other compensation for any alleged investment advice.

In sum, plaintiffs have not offered sufficient evidence to create a genuine issue as to whether Salomon qualifies as an ERISA fiduciary. Salomon is entitled to summary judgment with respect to Count I of the Second Amended Complaint.

Count II

In this count, plaintiffs contend that regardless of whether Salomon qualifies as a fiduciary, they are entitled to restitution from Salomon because Salomon is a "party in interest" within the meaning of ERISA and, as a result, ERISA § 1106(a)[9] prohibits Salomon's participation in the Fee

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[9] The pertinent portions of § 1106(a) provide that

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(...continued)

Agreement transactions. 29 U.S.C. §§ 1106(a)(1)(A) and (D). They seek recovery pursuant to ERISA § 1132(a)(3)[10]. Salomon responds that the court should enter summary judgment in its favor, not plaintiffs, because ERISA does not authorize any private cause of action against nonfiduciaries, even parties in interest who have engaged in § 1106(a) prohibited transactions. Assuming, for purposes of argument, that statutory authority exists, Salomon further contends that Seventh Circuit precedent precludes all private avenues of recovery against nonfiduciaries for participation in prohibited transactions. Salomon finally asserts that plaintiffs have failed to satisfy their evidentiary burden with respect to essential elements of their claim.

a. Availability of a Private Remedy

Determining whether count II alleges a valid cause of action centers on two closely related but distinct issues:

> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> * * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1)(A) & (D).

[10] This section provides that fiduciaries of a plan, like plaintiffs, may bring suit

> (A) to enjoin any act or practice which violates any provision of this subchapter [relating to the protection of employee benefit rights] or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3)(A) & (B).

whether it is a violation of ERISA for a nonfiduciary party in interest to engage in a § 1106(a) prohibited transaction and, if yes, whether ERISA affirmatively authorizes plaintiffs to bring suit to redress such a violation. Although the line between these issues is sometimes obscure, separate treatment provides a more reasoned understanding of ERISA's language and legislative history, as well as the relevant case law.

Turning to the first issue, Salomon relies on *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993), to assert that § 1106(a) does not explicitly impose any duty on *nonfiduciary* parties in interest to avoid participation in the indicated "prohibited" transactions, and, therefore, it has committed no wrong that is remediable under ERISA. In *Mertens*, the Supreme Court considered whether ERISA authorizes a cause of action against a nonfiduciary for knowing participation in the breach of another's fiduciary duties. The Court recognized that § 1132(a)(3), the same enforcement provision that is at issue here, does not authorize suit to obtain equitable relief "at large" but only for the purpose of "redress[ing] any violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. *Id.* at 253, 113 S. Ct. at 2067. Because no ERISA provision explicitly requires nonfiduciaries to avoid participation in an ERISA fiduciary's breach of its duties, the Court made clear its view, although in dicta, that such participation cannot be said to violate ERISA and, therefore § 1132(a)(3) would not authorize suit.[11] *Id.* Salomon would have the court apply identical rea-

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[11] The Court's discussion of this issue is dicta because the parties in *Mertens* assumed that the defendant's conduct violated ERISA. Therefore, the arguments before the Court and the Court's holding were limited to what forms of relief are available under § 1132(a)(3). *Mertens*, 508 U.S. at 254-55, 113 S. Ct. at 2067. Nevertheless, the Seventh Circuit has found the *Mertens* dicta to be controlling within this circuit. *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994)("the Supreme Court has made (...continued)

soning to find that Salomon had no duty to avoid participation in the Fee Agreements. The Court in *Mertens*, however, specifically contrasted the absence of any provision giving rise to a nonfiduciary's duty to avoid "knowing participation," with other provisions which, it recognized, can be read to impose an obligation on nonfiduciary parties in interest to avoid participation in § 1106(a) transactions. *Mertens*, 508 U.S. at 254 & n.4, 113 S. Ct. at 2067 & n.4 ("ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries . . . ." "For example, a 'party in interest' . . . may not offer his services or engage in certain other transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2)."). Salomon's attempt to counteract the importance of the Supreme Court's distinction between the lack of duty in the case before it and the presence of a duty regarding § 1106(a) is without force. Indeed, Salomon seems to accept *Mertens*' belief that § 1106(a) can be read as imposing obligations on nonfiduciary parties in interest, but argues that the existence of a duty is not enough to authorize a civil action against it. *See e.g.*, Salomon's Memorandum Addressing Cases Supplementally submitted by Plaintiffs on the Parties' Cross Motions for Summary Judgment at 6. This argument is more applicable to the second half of the analysis and will be discussed below. Further, several appellate courts have acknowledged the significance of this distinction and have concluded that parties in interest are obligated to avoid the transactions prohibited in § 1106(a). *See e.g., Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).

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clear its view that Congress's omission to impose on nonfiduciaries a duty not to participate knowingly in an ERISA fiduciary's breach of fiduciary obligations was not inadvertent").

In addition to the Supreme Court's acknowledgment, ERISA's legislative history reflects a congressional intent to obligate nonfiduciary parties in interest to abstain from participation in § 1106(a) transactions. A Joint Explanatory Statement of the Committee of Conference ("Conference Report"), reveals that, "[t]he conference substitute[12] prohibits plan fiduciaries *and parties in interest* from engaging in a number of specific transactions." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 5087 (emphasis added). The Conference Report further indicates that "blind" purchases or sales, *e.g.*, where neither party knows the identity of the other, will not ordinarily be prohibited transactions, because "there is no reason to impose a sanction on a fiduciary (*or party-in-interest*) merely because, by chance, the other party turns out to be a party-in-interest (or plan)." *Id.* (emphasis added). Thus, the legislative history recognizes, at least implicitly, that both parties may be subject to sanctions when the parties in a prohibited transaction are known to each other. Contrary to Salomon's contention, then, the legislative history reveals that Congress perceived certain transactions between a plan and a party in interest as problematic, and in enacting § 1106(a) it intended to impose a duty on both parties in interest and fiduciaries to avoid such transactions. *Accord, Comm'r. of Internal Revenue v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160, 113 S. Ct. 2006, 2012 (1993)("Congress' goal [in § 1106(a)] was to bar

[12] In enacting ERISA, the House of Representatives proposed a bill which the Senate rejected. The Senate then proposed its own legislation in the form of amendments to the House bill. Because of significant differences between the House and Senate proposals, the bills were sent to a committee of conference which agreed to a "conference substitute." The conference substitute was approved by both houses and enacted into law.

categorically a transaction that was likely to injure the pension plan.").[13]

Nevertheless, Salomon argues, the Seventh Circuit's adoption of the *Mertens* dicta in *Continental Casualty* is controlling within this circuit. In *Continental Casualty*, the Seventh Circuit determined that it was bound to follow *Mertens*' view that ERISA failed to impose any duty on nonfiduciaries to avoid knowing participation in an ERISA fiduciary's breach of its duties. 33 F.3d at 757. Although the Seventh Circuit found that dicta to be sufficiently weighty to control the outcome of the very issue that the dicta addressed, it did so only with some degree of discomfort. *Id.* at 757 (indicating that the Supreme Court's discussion was based on "a strict constructionist's approach that we might not embrace as an original matter"). In light of this obvious unease, it is not at all clear that the Seventh Circuit would find a similar lack of duty under the circumstances of this case, especially where *Mertens* itself, subsequent appellate court cases and ERISA's legislative history all indicate that different treatment is appropriate. Parties in interest, even if not fiduciaries of a plan, have a duty under § 1106(a) to avoid the transactions identified therein.

The question then becomes whether ERISA authorizes a private cause of action to recover against nonfiduciary parties in interest who violate § 1106(a). Salomon contends that ERISA not only fails to expressly create a private right of action but that the legislative history demonstrates that Congress rejected any such right. In contrast, the circuit courts that have addressed the issue have uniformly found

[13] Indeed, if there were no duty to avoid such transactions, one might wonder whether there is any basis for imposing administrative penalties against parties in interest, a remedy which Salomon concedes is authorized. *See* 29 U.S.C. § 1132(i).

that ERISA's civil enforcement provision, 29 U.S.C. § 1132, provides the requisite authority. *See e.g., Stangl*, 73 F.3d at 1032; *Landwehr*, 72 F.3d at 734; *Compton*, 57 F.3d at 285-87; *Rowe*, 20 F.3d at 31. Despite factual differences between those cases and this one, their reasoning is persuasive.

The language of § 1132(a)(3) is plainly broad enough to constitute the needed "affirmative authorization." Under its terms, plaintiffs are entitled to bring an equitable action to redress any violation of ERISA or to enforce the terms of the statute. Because a party in interest's participation in a § 1106(a) prohibited transaction violates the statute, plaintiffs' suit can be said to be intended to redress the alleged violation and to enforce ERISA's ban on those transactions. That § 1132(a)(3) does not identify specific categories of potential defendants makes it clear that it was intended to authorize suit against any entity that violates ERISA. Thus, whether Salomon is a proper defendant does not turn on whether it is a fiduciary or nonfiduciary but on whether it violated ERISA, that is to say, whether it is in fact a party in interest who engaged in a prohibited transaction.

This conclusion is in accord with *Mertens* where the Court made clear its belief that § 1132(a)(5)[14] did not authorize suit because the nonfiduciary defendant had not violated ERISA, not because the section failed to expressly authorize suits against nonfiduciaries. Moreover, the Court strongly suggested that private suits could be used as an avenue of recovery against nonfiduciary parties in interest who engage in

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[14] Although the Court in *Mertens* was directly confronted with an action by the Secretary of Labor pursuant to § 1132(a)(5) (authorizing the Secretary of Labor to file suit on the same basis that a plan fiduciary, beneficiary or participant file suit under § 1132(a)(3)), the Court stated that the language of § 1132(a)(3) should be deemed to have the same meaning as § 1132(a)(5). *Mertens*, 508 U.S. at 260, 113 S. Ct. at 2070.

prohibited transactions. It stated, "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . ." Salomon counters that the Court must have been referring to the administrative "correction" of a prohibited transaction.[15] *See* 29 U.S.C. § 1132(i). Such an assumption, however, makes little sense in light of the mandatory nature of the Court's language. Although § 1132(i) authorizes the Secretary of Labor to levy a greater penalty against a party in interest if a prohibited transaction is not corrected, nothing in that section says that a party in interest must correct the transaction. Thus, despite the threat of a fine up to 100% of the amount at issue, a party in interest is nonetheless free to keep any ill-gotten plan assets.[16] The more reasonable interpretation of *Mertens* is that the Court

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[15] Section 1132(i) provides that

> In the case of a transaction prohibited by section 1106 . . . by a party in interest . . ., the Secretary [of Labor] may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved . . .; except that if the transaction is not corrected . . . such penalty may be in an amount not more than 100 percent of the amount involved.

29 U.S.C. § 1132(i). "Correction is accomplished by undoing the prohibited transaction to the extent possible. *See* 29 C.F.R. § 2560.502i-1(c), *incorporating*, 26 C.F.R. § 53.4941(e)-1(c)(1).

[16] Under some circumstances, refusal to correct a prohibited transaction may be the more attractive option. Even where a party in interest corrects the transaction, the Secretary of Labor may still impose a civil penalty of up to 5 % of the amount at issue. 29 U.S.C. § 1132(i).

was referring to an ability to use civil actions under § 1132(a) to force a party in interest to disgorge.[17]

Salomon insists, however, that Congress's specific imposition of administrative penalties and excise taxes on parties in interest is proof that all other remedies should be excluded. This argument is at odds with both the language of § 1132(a)(3) and ERISA's statutory purposes. ERISA is intended to provide protection for the interests of participants in employee benefit plans. 29 U.S.C. § 1001. Moreover, the Supreme Court has recently recognized that § 1132(a)(3) is a catch-all provision that operates as a safety net when the specific remedies set forth under ERISA are inadequate. *Varity Corp. v. Howe*, __ U.S. __, 116 S. Ct. 1065, 1077-78 (1996). To find that administrative penalties and excise taxes are the exclusive remedies against parties in interest who have engaged in prohibited transactions would provide little, if any, protection for the interests of the plan participants. For example, where the fiduciary who caused the plan to enter the transaction is judgment proof, there might be no means to recover the plan's lost assets. As the Ninth Circuit recognized in Landwehr, limiting the potential defendants to only one of two parties to the transaction, far from providing the full range of remedies available, would render the available

[17] The Court's subsequent statement indicating that service providers "(assuming nonfiduciaries can be sued under [§ 1132](a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees," is best understood as specifically referring to suits against nonfiduciary service providers for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. *See Mertens*, 508 U.S. at 262, 113 S. Ct. at 2072. As already discussed, the Court believed that such participation was not an ERISA violation, but assuming it was, it makes clear that § 1132(a)(3) would authorize an action for injunctive relief, restitution or other equitable remedies.

relief wholly inadequate. Landwehr, 72 F.3d at 734, *citing, Nieto v. Ecker*, 845 F.2d 868, 874 (9th Cir. 1988).

Salomon argues, however, that ERISA's legislative history undeniably shows that Congress expressly rejected any private cause of action against nonfiduciary parties in interest, and therefore the general language of § 1132(a)(3) should not be used to bring in such an action "through the back door." The court does not agree. Each of the rejected provisions would have imposed personal liability on parties in interest, subjecting them to claims for legal relief, *e.g.*, damages. The rejection of those provisions, however, does not necessarily rule out the potential for a compromise somewhere between no civil liability and personal liability for all losses, *e.g.*, the availability of a suit limited to equitable relief. Indeed, the final language of § 1132(a), with its inclusion of catch-all provisions for equitable relief, appears to be just such a negotiated compromise.[18]

But, Salomon argues, the Conference Report also states that ERISA's "labor provisions," of which § 1132 is a part, apply rules and remedies similar to trust law governing the conduct of *fiduciaries*, while the "tax provisions" (§§ 1201 *et seq.*) apply to "disqualified persons," i.e., parties in interest, who violate the new prohibited transaction rules. *See* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted*

[18] The original House bill would have made only fiduciaries personally liable for losses resulting from a violation of the prohibited transaction rules but even then only if there was no adequate consideration for the transaction. The Senate version, by contrast, would have extended legal relief to both fiduciaries and parties in interest, even if there was adequate consideration. The conference substitute appears to reach a compromise between these extremes in a number of ways, including the inclusion of § 1132(a)(3) and (5) which, while otherwise limiting the availability of legal relief to defendant fiduciaries, permit recovery of only equitable relief from nonfiduciaries who violate the Act.

in, 1974 U.S.C.C.A.N. at 5076. The intent that Salomon attributes to this statement (that the remedies provided in § 1132(a) should be limited to fiduciaries, while the tax provisions apply to parties in interest) is based on an overly narrow reading of the statute and the legislative history. Although Congress incorporated principles of traditional trust law into the labor provisions, it does not mean that Congress did not intend to extend the use of those principles beyond parties who would have constituted fiduciaries at common law. To the contrary, the Conference Report specifically states that the labor provisions affect "parties-in-interest," distinguishing this broader range of people from the "disqualified persons" affected by the tax provisions. *Id.* at 5087. Moreover, ERISA, in part, is a direct reflection of Congress' determination that trust law does not offer adequate protection to employee benefit plans. *See Varity Corp.*, __ U.S. __, 116 S. Ct. at 1070.

Salomon finally argues that regardless of the statutory analysis, the Seventh Circuit has unquestioningly foreclosed private claims against a nonfiduciary for ERISA violations, including participation in § 1106(a) prohibited transactions. This conclusion is built on a multi-tiered argument. First, Salomon correctly points out that any relief sought under § 1132(a)(3) must be equitable in nature. Second, Salomon contends, the Seventh Circuit, in *Continental Casualty*, held that restitution sought from a nonfiduciary is only equitable when the claim for recovery is based on a theory of aiding and abetting, i.e., knowing participation in, a breach of fiduciary duties. But, *Continental Casualty*, embracing *Mertens*' dicta, has held that a nonfiduciary cannot be held liable under § 1132(a)(3) for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. Thus, Salomon concludes, a claim for restitution against a nonfiduciary necessarily falls into one of two categories: either it constitutes a claim for legal relief and is barred by *Mertens*, or it is based on an aiding and abetting/knowing participation theory and is

barred by *Continental Casualty's* adoption of the *Mertens* dicta.

The court is not persuaded by this argument. In *Continental Casualty*, the Seventh Circuit merely expressed a belief, though ultimately unnecessary to its decision, that restitution is not an exclusively equitable remedy. *Continental Casualty*, 33 F.3d at 756. It explained that whether restitution is an equitable remedy turns on whether the duty giving rise to the claim is founded on legal or equitable principles. The court concluded that the claim before it (nonfiduciary's knowing participation in a breach of fiduciary duty) was founded on equitable principles. Contrary to Salomon's contention, however, it did not hold, or even suggest, that such a claim was the only one where a request for restitution from a nonfiduciary could be based on equitable precepts. Indeed, such a limitation would be inappropriate in light of traditional trust law which provides rules permitting equitable actions to regain improperly transferred trust property for reasons other than the recipient's knowing participation in the trustee's breach of its fiduciary duties. *See e.g.*, 4 A. Scott & W. Fratcher, *The Law of Trusts*, §§ 288-94 (4th ed. 1989); Restatement (Second) of Trusts, §§ 280-295 (1959)(both discussing recovery from gratuitous donees and from recipients of trust property via illegal transactions). Salomon is not entitled to summary judgment on this basis.

b. Failure of Proof

Salomon next argues that it is entitled to summary judgment because under *Continental Casualty*, plaintiffs must prove that Salomon knowingly participated in NISA's knowing breach of its fiduciary duties. In other words, there must be evidence that NISA, as APT's fiduciary, caused APT to enter into the Fee Agreements with knowledge that they were prohibited transactions and that Salomon participated in the transactions knowing they were prohibited and that NISA was breaching its fiduciary duty.

Here, plaintiff has provided proof that NISA was a fiduciary of the plan and that it caused APT to enter into the participation interest transactions. Moreover, there is sufficient evidence in the record relating to Salomon's earlier provision of services to NISA/APT to suggest that NISA knew or should have known that Salomon was a "person providing services to [APT]."[19] Nothing in the statute suggests that NISA had to have actual knowledge that the transaction was in fact illegal or that NISA qualified, legally, as a party in interest. Thus, the record is sufficient to raise a question of fact as to whether NISA knew or should have known that the transaction was a sale or exchange of property between the plan and a party in interest or for the benefit of a party in interest.

Moreover, as discussed above, Salomon's liability is premised on a direct violation of ERISA, and not, as Salomon argues, on secondary liability for knowing participation in NISA's breach. While Congress has made clear that § 1106 does not create a strict liability cause of action in the sense that even a blind transaction would constitute a prohibited transaction, *see* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. at 5087, actual knowledge that the transaction was in fact prohibited does not appear necessary. Rather, knowledge that it was a service provider to an employee pension benefit plan and was engaging in a transfer of property with the plan or its fiduciary is enough. Plaintiffs' evidentiary submissions are sufficient to satisfy this standard. Salomon is not entitled to summary judgment with respect plaintiffs' claims that Salomon has violated § 1106(a)(1)(A) and (D).

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[19] ERISA broadly defines the term "party in interest" to include, among other things, "a person providing services to [a] plan." 29 U.S.C. § 1002(14)(B).

c. Availability of Restitution as a Remedy

Alternatively, and without much elaboration, Salomon argues that plaintiffs are barred from obtaining restitution because they affirmed the purchase of the Fee Agreement participation interests when they opted to sell APT's claims that were filed in MOA's bankruptcy proceeding. Plaintiffs respond that, as fiduciaries of APT, they were merely satisfying their duty to mitigate damages and to rid APT of an imprudent investment.

As a general rule, if a person continues to perform a contract after discovering facts which make it voidable (e.g., fraud), it is inferred that he has affirmed the contract and he is no longer entitled to avoid it and obtain restitution. *See* Restatement of Restitution § 68 (1937). Plaintiffs' sale of APT's claim in MOA's bankruptcy proceeding, however, is more akin to an attempt to preserve what APT had already invested than it is to continued performance. Such acts of preservation do not extinguish the right to restitution. *Id.* § 68 comment b. Moreover, the rule regarding affirmance of the contract appears, at least in part, to arise out of the requirement that the person seeking restitution tender back or at least offer to tender back the subject matter of the contract. *Soderberg v. Gens*, 652 F. Supp. 560, 565 (N.D. Ill. 1987). In this way, any potential unjust enrichment of the rescinding party is avoided. *See* Restatement of Restitution § 65. Acts of affirmance would necessarily be in conflict with the ability to tender. Here, however, plaintiffs claim that Salomon's misrepresentations caused NISA to purchase participation interests that were in fact worthless. As a result, no offer to restore the participation interests to Salomon is required. *Id.* § 65 comment e.

The court concludes, in light of the above principles, that the sale of APT's bankruptcy claims does not prevent this action for restitution.

d. Plaintiffs' Cross Motion

The conclusion that Salomon is not entitled to summary judgment, however, does not necessarily entitle plaintiffs to a favorable ruling with respect to their cross motion on count II. Salomon argues that plaintiffs' motion should be denied because there is a genuine issue of material fact regarding the applicability of Prohibited Transaction Exemption 75-1 ("PTE 75-1") in which the DOL and the Internal Revenue Service established a safe harbor for certain "customary securities transactions." PTE 75-1 provides that the prohibitions of § 1106 will not apply to "any purchase or sale of a security between an employee benefit plan and a broker-dealer . . . if [the enumerated] conditions are met." 40 Fed. Reg. at 50847. Plaintiffs respond that Salomon is not entitled to the protections of PTE 75-1 because the participation interests sold to APT are not "securities" and, even if they were, there is no evidence that the conditions specified in PTE 75-1 are satisfied.

The parties agree that the definition of a "security" in the federal securities laws controls whether the participation interests in the Fee Agreements constitute securities within the meaning of PTE 75-1. *See* 15 U.S.C. §§ 77b(1) and 78c(10). These statutes provide that a "security" is "any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement, . . . investment contract, . . . or in general, any instrument commonly known as a security . . . . *Id.* § 78c(10).[20] In addition to ordinary stock and bonds, it is intended to encompass "countless and

[20] The definition of "security" set forth in 15 U.S.C. § 77b(1) is virtually the same and, in practice, the two definitions are considered interchangeable. *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 411 n.5 (7th Cir. 1988), *citing, Tcherepnin v. Knight*, 389 U.S. 332, 335-36, 88 S. Ct. 548, 553 (1967).

variable schemes devised by those who seek the use of the money of others on the promise of profits . . . ." *SEC v. W.J. Howey, Co.*, 328 U.S. 293, 299, 66 S. Ct. 1100, 1103 (1946). It extends to many uncommon and irregular instruments, not just instruments traded at securities exchanges. *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S. Ct. 1220, 1223 (1982). Nevertheless, the statute's broad sweep is tempered by the fact that "Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world. . . ." *Id.* Moreover, instruments technically falling within the statutory description will not be considered a security if the context requires otherwise. 15 U.S.C. §§ 77b(1) and 78c(10); *Marine Bank*, 455 U.S. at 558, 102 S. Ct. at 1225.

As an initial matter, Salomon has moved to strike the affidavits of two law professors submitted in support of plaintiffs' motion. In the affidavits, the professors, both experts in securities law, set forth their opinions that the four Fee Agreements are not securities and that the sale of the participation interests (via the Assignments) do not constitute the sale of securities. While expert legal testimony may be appropriate in some circumstances, the court concludes that the affidavits of professors Coffee and Seligman go beyond that which proper. Rather than express their opinions regarding significant factual characteristics of securities in general, Professors Coffee and Seligman have started with certain assumptions about the legal definition of a security (presumably provided to them by plaintiffs' counsel) and then proceeded to evaluate the specific evidence in this case to determine what the "facts" are. In short, while the affidavits carry the added imprimatur of securities experts, they offer nothing more than legal argument typically supplied by a party's legal representative. On a motion for summary judgment, it is the duty of the court to construe the law, interpret the evidence in the appropriate manner and to determine whether there is any genuine issue of material fact

which necessitates a trial. Because the affidavits of plaintiffs' legal experts usurp this judicial function, they will be stricken.[21]

Salomon asserts that there is a genuine issue of fact as to whether the sale of the participation interests to APT constituted the sale of securities because the participation interests qualify as any one of four separate instruments contained in the statutory definition of security. More specifically, Salomon asserts that the participation interests qualify as "evidence of indebtedness," "participations in a profit sharing agreement," "investment contracts," or "other instruments commonly known as securities."

In *Howey*, 328 U.S. at 299, 66 S. Ct. at 1103, the Supreme Court established the test for determining whether a particular transaction constitutes an "investment contract" security. The salient characteristics of such a security are a transaction whereby a "person invests his money in a common enterprise and is led to expect profits solely from the effort of the promoter or a third party." *Id.* While this test does not apply to all the types of instruments set forth in the statutory definition, the Supreme Court later recognized that it is equally applicable to the general category of "instrument commonly known as a security." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691 n.5, 105 S. Ct. 2297, 2304-05 n.5 (1985). Further, the Seventh Circuit has held that the same requirements apply to the category of "participations in a profit sharing agreement." *Secon Service System, Inc. v. St.*

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[21] Anticipating the worst, Salomon submitted a counteraffidavit from a third law professor who opined that both the Fee Agreements and the Assignments constitute securities. Salomon states that this counteraffidavit is only to be considered in the event that the affidavits of plaintiffs' legal experts are not stricken. In light of the above ruling, the court has not considered this counteraffidavit.

Joseph Bank & Trust Co., 855 F.2d 406, 411 (7th Cir. 1988), *citing, Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 102 (7th Cir. 1977). Thus, these three categories may be considered together.[22]

To avoid summary judgment under the *Howey* test, there must be some evidence that there has been an 1) investment of money, 2) in a "common enterprise," 3) with an expectation of profits, 4) derived primarily from the efforts of a third party. Plaintiffs assert that Salomon cannot establish that the second element because APT was the only investor in the participation interests. Although there is a split among the circuits, the Seventh Circuit has consistently adhered to the belief that "horizontal commonality" is a necessary requirement to establish the common enterprise element of the *Howey* test.[23] *See e.g., SEC v. Lauer*, 52 F.3d 667 (7th Cir. 1995); *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016 (7th Cir. 1994); *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972). This means that the transaction must involve not only a pooling of interests between a devel-

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[22] Salomon relies on *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945 (1990), to argue that the *Howey* test does not apply when an instrument falls within any category of the statutory definition (other than investment contract), rather the instrument is presumed to be a security unless the context indicates otherwise. This argument is not persuasive. In *Reves*, the court reconfirmed its earlier statement in *Landreth* to the effect that the *Howey* test cannot be said to apply to every type of instrument listed in the statute. It then went on to establish its own test for "notes." Nothing in *Reves*, however, suggested that the Court believed the *Howey* test was inappropriate for participation interests or other instruments commonly known as securities.

[23] As pointed out in *Wals*, the Fifth, Eighth and Tenth circuits appear to require only "vertical commonality," which is present when the interests of the promoter and an individual investor are connected. *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016, 1017 (7th Cir. 1994).

oper/promoter and an investor, but also among several investors. In other words, investors must have pooled their resources to obtain an undivided interest in a common asset from which they expect to obtain a profit based primarily on the efforts of others. Based on the record before this court, however, APT was the only actual investor in the participation interests.

Salomon argues that APT was not the only investor because Salomon retained an undivided 5% interest in three of the four Fee Agreements and, like APT, expected to receive it share of MOA/Best Inns' profits associated with that interest. Additionally, Salomon points out, MOA/Best Inns only agreed to pay Salomon a portion of the profits from the motel operations and, therefore, MOA/Best Inns also had an undivided, shared expectation of profit. This argument is unpersuasive. The clear implication of this circuit's interpretation of the *Howey* test is that several investors must pool their resources with the expectation that another's use of that money will produce a profit or return on their investment. Under the record in this case, Salomon cannot be characterized as such a passive investor who has jointly pooled its funds with APT. Each of the Fee Agreements expressly provide that any payments to be made are consideration for Salomon's work in placing the mortgage notes issued by MOA/Best Inns. This suggests that money Salomon expected to receive was compensation for services performed, not a return or profit on an investment. Although Salomon presents evidence that the impetus behind the Fee Agreements was Salomon's decision to place its own money at risk by serving as a principal and purchasing the underlying mortgage notes (rather than simply acting as a placing agent), this evidence does not alter the essential character of the payments to Salomon under the Fee Agreements. Salomon's "investment" was in the mortgage notes, the Fee Agreements were compensation for its services. Similarly, Salomon's rather novel argument that MOA/Best Inns' retention of a certain percentage of its profits makes MOA and Best Inns co-investors for purposes of establishing horizontal commonality is not convincing. Clearly, profit to the companies would result from their operation and management of the motel properties, not from a passive investment of money therein.

Even if APT were the only investor in the participation interests, Salomon further argues that *Lauer*, the Seventh Circuit's most recent "common enterprise" case, essentially eliminated the requirement of actual horizontal commonality. In *Lauer*, the defendant promoter of a fraudulent investment program attempted to avoid application of the securities laws by arguing that he only persuaded one person to actually invest in the scheme. The court concluded that it was appropriate to judge the promoter's offering as what he represented it to be. In other words, where part of the alleged fraud is that the instrument for sale is a security when it is nothing of the kind, the defrauding promoter is estopped to deny the existence of a security. In reaching it conclusion, the court reasoned that "it is the character of the investment vehicle, not the presence of multiple investors, that determines whether there is an investment contract." *Lauer*, 52 F.3d at 670. Although the context in which *Lauer* was decided is distinct from the present case, the reasoning of the court suggests that horizontal commonality cannot be determined solely from the *actual* presence of multiple investors. Rather, the court must assess the intended character of the instrument. In this way, the existence of security status is protected against the fortuity that only one person in fact chooses to invest.

Here, Salomon has offered evidence that an offering memorandum was prepared with respect to the sale of the participation interests in the first three Fee Agreements and that such a memorandum was drafted but never completed with respect to Fee Agreement IV. The record also reveals that NISA/APT received the offering memoranda. All of these memoranda referred to multiple investors. Further,

Salomon personnel have testified that other potential investors were contacted with respect to participating in Fee Agreement I and that Salomon was prepared to seek out other investors if APT did not buy the participations in Fee Agreements I-IV. These pieces of evidence, while not particularly persuasive, are sufficient at this juncture to raise a question of fact regarding the intended character of the participation interests. Thus, on this record, there remains a genuine issue as to whether the participation interests are securities within the meaning of PTE 75-1.

But, plaintiffs argue, even if the participation interests might be a security, summary judgment is appropriate because PTE 75-1 only exempts securities sold under certain conditions and there is no evidence that one of those conditions is satisfied.[24] More specifically, they assert that Salomon has not offered any evidence that the transactions were as favorable to APT as an arms-length transaction with an unrelated third party would have been. A review of the record, however, reveals that Salomon has provided at least some proof indicating that an unrelated party might have paid a similar price for the participation interests. For example, for unrelated purposes, Salomon itself valued the Fee Agreements at approximately the value which the parties eventually ascribed to them. While such evidence may not ultimately be sufficient to carry the day, when taken in a light favorable to Salomon, it is enough to avoid summary judgment. Whether the transaction was as favorable to APT as an arms-length transaction would have been necessarily involves a highly factual determination of the fair market value of the participation interests. The court is not prepared to

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[24] Plaintiffs' argument that PTE 75-1 is inapplicable because the Fee Agreements were not "customary" securities and were not subject to close regulation lacks force. Those factors are not required to qualify for the exemption. *See* 40 Fed. Reg. at 50847.

conclude that there is no genuine issue of fact in that regard. Because there remains a triable issue of fact with respect to the applicability of PTE 75-1, plaintiffs also are not entitled to summary judgment with respect to count II.

Count III

Count III alleges that Salomon knowingly participated in NISA's breach of its fiduciary duties to APT by selling the interests in the fee agreements to NISA for APT's benefit. In other words, plaintiffs contend that Salomon is secondarily liable for its knowing participation in NISA's involvement in a § 1106 prohibited transaction. Salomon argues that it is entitled to summary judgment because *Mertens* and *Continental Casualty* make clear that ERISA does not provide a cause of action against nonfiduciaries for knowing participation in another person's fiduciary breaches. Plaintiffs respond that *Mertens* and *Continental Casualty* are not controlling in light of Salomon's status as a party in interest.

Plaintiffs' attempt to avoid the rule of *Continental Casualty* is without force. As discussed above, the Seventh Circuit, relying on the *Mertens* dicta, specifically held that nonfiduciaries cannot be found liable for knowing participation in another person's fiduciary breaches. This rule is equally applicable to nonfiduciaries who also happen to be parties in interest. While this may appear to be at odds with the above discussion regarding count II, it is not. The confusion stems from the fact that the alleged fiduciary breach happens to be NISA's participation in a § 1106 prohibited transaction. As discussed above, nonfiduciary parties in interest may be held liable under § 1132 for their own involvement in a prohibited transaction because § 1106 can be read to affirmatively impose an obligation of parties in interest to avoid such transactions. Their status as a party in interest, however, does not subject such persons to derivative liability for another's violation of ERISA. Thus, to the extent that Salomon participated in a prohibited transaction, it

may be found directly liable under count II. Salomon cannot otherwise be held accountable to plaintiffs for damages as alleged in count III. For these reasons, Salomon is entitled to summary judgment with respect to count III.

Statute of Limitations

Salomon further argues that, at the very least, the running of the statute of limitations entitles it to summary judgment with respect any cognizable ERISA claim arising out of the sale of the participation interests in Fee Agreements I and II. A plaintiff must bring claims for ERISA violations within six years after the date of the last action which constituted the violation or three years after the plaintiff had actual knowledge of the alleged violation, whichever is earlier. 29 U.S.C. § 1113. Because APT knew the parties to the transactions and their relationship to the plan at the time NISA purchased the participation interests in Fee Agreements I and II (on October 28, 1987 and April 28, 1988, respectively), Salomon submits that plaintiffs had actual knowledge of the alleged § 1106 violation at the time of the closings. Despite this knowledge, plaintiffs did not commence this action until March 27, 1992. Plaintiffs respond that Ameritech's employees and NISA did not understand that any of the participation interests violated ERISA until sometime in 1990 and that Salomon repeatedly misled NISA and APT regarding the viability of the MOA/Best Inns portfolios.

Actual knowledge under 29 U.S.C. § 1113 only requires knowledge of the essential facts of the illegal transaction, not its illegality. *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992). Nevertheless, mere notice that something is awry is not enough, the plaintiff must have specific knowledge of the facts that would establish the breach of duty upon which he sues. *Radiology Center, S. C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir. 1990). Yet, as Salomon has so carefully pointed out, here there are factual questions whether the sales of the

participation interests fall within the safe harbor provisions of PTE 75-1. Assuming that the participation interests do not constitute securities, as plaintiffs argue, then knowledge of the essential facts would seem to require no more than knowing the parties to the transaction and their relationship to APT. Plaintiffs do not argue that they were unaware of those facts at the time of the closings on Fee Agreements I and II. On the other hand, if it is determined that the participation interests are securities, then the essential facts of which plaintiffs would need specific knowledge would include information that the transaction was not as favorable to APT as an arms-length transaction with an unrelated third party would have been. Plaintiffs' evidence that Salomon misled NISA and APT regarding the viability of the MOA/Best Inns portfolios until sometime in 1990 creates a question of fact as to when plaintiffs gained that knowledge which was essential to their claim. Any ruling on the statute of limitations issue is, therefore, premature.

Salomon's Counterclaims for Contribution

In its counterclaims, Salomon alleges that if it is liable to APT for any breach of duty (count I) or for any transactions which violated ERISA § 1106 (count II), then it is entitled to contribution from Ameritech because Ameritech similarly must have breached its duties to APT. Plaintiffs assert that there is no right of contribution under ERISA, but even if there is, Ameritech is entitled to summary judgment in its favor because the undisputed evidence establishes that NISA controlled the decision to invest in the Fee Agreements and to the extent that the available relief is equitable, contribution is inappropriate.

In a well reasoned ruling on plaintiffs' earlier motion to dismiss Salomon's counterclaims, Judge Aspen rejected plaintiffs' argument that there is no right to contribution under ERISA. The court is not inclined to revisit this issue. Plaintiffs have failed to identify any specific changes in the

law that would affect that ruling. Moreover, regardless of whether there may be some right to contribution under ERISA, Salomon has no such right here. In light of the above rulings, the only remaining ERISA cause of action is Salomon's alleged violation of § 1106 based on its status as a party in interest and its participation in prohibited transactions. As a result, the recovery plaintiffs seek is limited to "appropriate equitable relief" such as restitution of the amount by which Salomon has been unjustly enriched. Unlike the damages that may have been available if Salomon had been a fiduciary of APT, "liability for [its] own ill-gotten gains cannot be shifted, even to one more culpable." *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 33 (D. Mass. 1990). This distinction makes sense. While a plaintiff's damages may result from the actions of more than one defendant, when recovery is based on the amount by which the defendant is unjustly enriched, there is no similar responsibility to be apportioned. The defendant unfairly received whatever it received. Thus, even if Ameritech breached a fiduciary duty vis a vis APT and may itself be liable in damages for its own breach of care, Salomon cannot shift the burden of paying whatever amount it may have unfairly received as a result of its alleged violation of ERISA § 1106.[25] Plaintiffs are entitled to summary judgment with respect to Salomon's counterclaims for contribution.

ORDER

For the foregoing reasons, it is hereby ordered as follows:

1. Defendants' Motion to Strike Affidavits of Plaintiffs' Proposed Law Professor "Experts" is granted.

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[25] This conclusion makes it unnecessary to consider plaintiffs' evidentiary argument that only NISA made the decision to invest in the Fee Agreements.

2. Defendants' Motion to Strike Certain Evidence relied upon in plaintiffs' July 11, 1995 12N Response is denied as moot in light of the other rulings contained herein.

3. Defendants' Motion for Summary Judgment on Plaintiffs' Federal Claims is granted as to counts I and III of the Second Amended Complaint and as to any claims contained in count II which are premised on an alleged breach of fiduciary duty. It is denied in all other respects.

4. Plaintiffs' Motion for Partial Summary Judgment is denied with respect to count II of the Second Amended Complaint and granted with respect to defendants' counterclaims for contribution.

5. The parties are directed to engage in good faith settlement discussions in an attempt to mutually resolve all remaining claims and if, despite the parties' sincere efforts, a settlement is not reached, the parties are further directed to agree on a briefing schedule for Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims. This matter is set for status on July 15, 1996 at 2:00 p.m.

s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW
United States Magistrate Judge

Dated: June 13, 1996

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	No. 92 C 5883
SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,	)	Magistrate Judge Lefkow
Defendants.	)	DOCKETED SEP. 10, 1996

[PROPOSED] ORDER MODIFYING THIS COURT'S DECISION TO CONFIRM THAT STATEMENTS OF THE FACTS IN THE DECISION CONSTITUTE A STATEMENT OF THE NON-MOVING PARTY'S EVIDENCE

It is hereby ordered that this Court's Memorandum Decision and Order, dated June 13, 1996 and filed June 18, 1996, is modified by the addition of the following paragraph to the bottom of page 3 of the Memorandum Decision

> Unless otherwise expressly stated, statements of the facts in the section of the Decision entitled "Factual Background" or elsewhere in the Decision constitute statements of the non-moving party's evidence or reasonable inferences therefrom viewing the evidence in the non-moving party's favor, and do not constitute rulings or findings of fact by this Court.

s/Joan H. Lefkow
U.S.M.J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 92 C 5883
SALOMON BROTHERS, INC., et al.,	)	
Defendants.	)	

RULING ON MOTION TO RECONSIDER OR CERTIFY FOR IMMEDIATE APPEAL

Joan H. Lefkow, Magistrate Judge

Salomon has asked the court to reconsider two portions of its June 13, 1996 Memorandum Decision in light of the Supreme Court's recent decision in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1996 WL 305742 (June 10, 1996). Salomon urges that *Lockheed*'s discussion of ERISA § 1106(a) makes it clear that there is no private right of action against a nonfiduciary party in interest who engages in a transaction prohibited by § 1106, but even if there were, that is limited to circumstances where a nonfiduciary has knowingly participated in a fiduciary's violation of § 1106. As a result, Salomon argues, the Seventh Circuit's decision in *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994), would bar the claim.

As previously stated in open court, the *Lockheed* decision does not necessitate reconsideration of this court's June 13 Decision. Although the Court in *Lockheed* found that to sustain a claim under § 1106(a), a plaintiff must show that a fiduciary caused the plan to engage in one of the transactions identified in that section, it did not state or even suggest that a nonfiduciary party in interest who benefitted from such an impermissible transaction cannot be held liable for restitution once such a showing is made. *Lockheed*, 116 S. Ct. at 17888-89, 1996 WL 305742, at *4. To the contrary, the Court specifically noted that the appellate court in *Lockheed* "was not necessarily wrong in saying that 'a party in interest who benefitted from an impermissible transaction can be held liable under ERISA.'" *Id.* at n.3. The Ninth Circuit's error was that it found the employer party in interest liable without even asking whether a fiduciary caused the plan to enter into the transaction, i.e., there was insufficient proof that the transaction from which the party in interest benefitted was impermissible under § 1106(a).

As noted in the June 13 Decision, plaintiff has provided some proof that NISA was a fiduciary of the plan, that NISA caused APT to enter into the transactions at issue and that Salomon is a party in interest who benefitted from the transactions. Assuming these facts ultimately are proved, the transactions would be impermissible because they were outside the scope of NISA's lawful authority. Under such circumstances, *Lockheed*, does not preclude holding Salomon liable under ERISA for restitution of the benefits it received from the transactions. The court further disagrees that the Court's reasoning in *Lockheed* effectively limits recovery against nonfiduciary parties in interest to those situations where the party in interest "knowingly participates" in the fiduciary's breach of its fiduciary duties. For the reasons amply discussed in the June 13 Decision, the court concludes that nonfiduciary parties in interest may be held responsible for their direct participation in or as beneficiary of § 1106(a)

transactions. This is separate from the question whether they may be held liable for their knowing aid to the fiduciary in causing the plan to engage in the transaction – a question that is not before this court. The motion for reconsideration will be denied.

Alternatively, Salomon seeks certification of two specific issues for appeal to the Seventh Circuit Court of Appeals under 28 U.S.C. § 1292(b). As a general matter, certification of a question for interlocutory appeal is the exception, not the rule. Nevertheless, a district court has discretion to grant such a motion where 1) the matter to be appealed involves a controlling question of law, 2) on which there is substantial ground for difference of opinion, and 3) immediate appeal could materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Plaintiffs' have not seriously disputed the first of these factors. Indeed, the determination from which Salomon seeks leave to appeal – the availability and scope of a private right of action under ERISA for equitable relief against nonfiduciary parties in interest – if incorrect, would seemingly lead to the dismissal of plaintiff's only remaining federal claim. The second factor – whether there is a substantial ground for difference of opinion on the issue(s) be appealed – is hotly disputed. Salomon, of course, believes that under *Lockheed* a private right of action against a nonfiduciary party in interest is nonexistent or, at the very least, its existence is an open question. Plaintiffs, by contrast, believe that the decision in *Lockheed*, merely confirms that which the circuit courts, at least those which have considered the issue, have already recognized, namely, that there is such a private right of action. Although a number of circuit courts have recognized a cause of action and this court was ultimately persuaded to agree, that alone does not demonstrate that there is no substantial ground for difference of opinion. In ruling on the parties' cross-motions for summary judgment, each side offered an abundance of

thoughtful arguments to support their respective positions. Thus, even though this court concluded that plaintiffs' arguments and authority were more persuasive, it cannot be said that the arguments supporting an opposite conclusion were insubstantial.

Nevertheless, before an issue can be certified for appeal, the district court must further be convinced that immediate appeal from the order in question will materially advance the ultimate termination of the litigation. The court does not believe that Salomon has made such a showing. If the appellate court upholds this court's ruling, it would offer little benefit in terms of simplifying the issues for trial and it would disadvantage both parties by delaying the final resolution of a matter that has already been in litigation more than four years, before two different judges. Even assuming that the Seventh Circuit were to reverse the June 13 Decision, it is highly likely that the parties would move forward toward a trial of the remaining issues. While the burden of trial might be shifted to another court, e.g., state court, an immediate appeal would not certainly advance the ultimate termination of the litigation. Indeed, the delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter suggest that regardless of the outcome, an immediate appeal would be a disservice to the litigants and the general administration of justice.

ORDER

For the reasons stated, it is hereby ordered that defendant's motion for reconsideration of this court's decision and order of June 13, 1996 or, in the alternative, to amend the court's order so as to certify it for interlocutory appeal [Docket Nos. 196-1 and –2] is denied in its entirety. Plaintiffs are further directed to file their response to Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims [Docket No. 122] on or before

October 25, 1996, and defendant shall file any reply thereto on or before November 8, 1996.

ENTER:

s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW

Dated: September 24, 1996

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON, Plaintiffs,	) CIVIL ACTON) No. 92 C 5883)) MEMORANDUM AND ORDER) ON DEFENDANTS' RENEWED) MOTION (1) TO AMEND JUDGE) LEFKOW'S JUNE 1996 ORDER) TO CERTIFY THE ORDER FOR) INTERLOCUTORY APPEAL PUR-) SUANT TO 28 U.S.C. § 1292
vs.	) (b), OR (2) TO RECONSIDER) RULINGS ON TWO CONTROL-
SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP., Defendants.	) LING LEGAL ISSUES IN JUDGE) LEFKOW'S JUNE 1996 ORDER)

The plaintiffs filed this action against the defendants in September 1992. Through numerous motions and orders, most of the plaintiffs' original claims have been dismissed. At the present time, only one claim remains. The case has been assigned to me from Judge Lefkow, and the defendants have filed a renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order. Both parties have filed briefs, and I have reviewed the relevant documents in this case. I shall grant the defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal.

ANALYSIS

The defendants motion to certify for interlocutory appeal involves two issues:

1) Does 29 U.S.C. § 1132(a)(3) affirmatively authorize a private right of action against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited by 29 U.S.C. § 1106(a), and

2) If so, is proof that such nonfiduciary party-in-interest knew it was a service provider to a pension plan and was engaged in a transfer of property with the plan or its fiduciary sufficient to hold such nonfiduciary liable under such private right of action – even if there is no proof that such nonfiduciary (i) knew that the transaction was a nonexempt prohibited transaction in violation of 29 U.S.C. § 1106(a) and (ii) knew that the fiduciary had caused the plan to engage in such transaction in breach of its fiduciary duties.

The statutory authority allowing for interlocutory appeals is found in 28 U.S.C. § 1292(b). This section gives the district court discretion to grant a motion for interlocutory appeal in cases where (1) the matter being appealed involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) where an immediate appeal from the order may materially advance the ultimate termination of the litigation.

I concur with Judge Lefkow's finding that the matters being appealed involve controlling questions of law and that even though she determined that a private right of action exists under § 1132, there is still a substantial ground for difference of opinion on this issue. Therefore, the first two factors for determining whether I may grant a motion for interlocutory appeal are met to my satisfaction. However, in order for me to amend Judge Lefkow's previous order and grant the defendants' motion for interlocutory appeal, I must find that

an immediate appeal may materially advance the ultimate termination of the litigation.

Judge Lefkow denied the defendants' motion to certify this issue for interlocutory appeal on September 24, 1996. One reason for denying the defendants' motion was that "[e]ven assuming that the Seventh Circuit were to reverse the June 13 decision, it is highly likely that the parties would move forward toward a trial of the remaining issues." *See* 9/24/96 Order at 4. Also, Judge Lefkow found that a reversal might shift the burden of trial to a state court, and the "delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter . . . would be a disservice to the litigants and the general administration of justice." *Id.* at 4-5. For these reasons, Judge Lefkow held that immediate appeal would not materially advance the ultimate termination of the litigation.

Subsequent to Judge Lefkow's September 24, 1996, order the defendants filed a motion for summary judgement on the plaintiffs' state law claims. Judge Lefkow granted the defendants' motion. Therefore, only one claim remains and there is no longer a concern that the parties would likely move forward to trial should the Seventh Circuit reverse Judge Lefkow's rulings. Additionally, the case has now been transferred to me, and so it is inevitable that a new judge will have to familiarize himself or herself with the complex facts and legal issues surrounding this case. Therefore, the two main reasons that Judge Lefkow denied the defendants' motion are no longer relevant, and it seems to me that an immediate appeal may materially advance the ultimate termination of the litigation.

Since I find that there is substantial ground for difference of opinion as to these controlling questions of law and that an immediate appeal from Judge Lefkow's order may materially advance the ultimate termination of this litigation, I shall

certify an interlocutory appeal from Judge Lefkow's September 24, 1996, order pursuant to 28 U.S.C. § 1292(b).

IT IS THEREFORE ORDERED that the defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal is granted in accordance with this order.

Dated January 7, 1998

BY THE COURT

s/Warren K. Urbom
United States Senior Judge

APPENDIX F

Statutory Provisions

1. Section 4975 of Title 26, United States Code, provides in part as follows:

§ 4975. Tax on prohibited transactions

(a) Initial taxes on disqualified person

There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) Additional taxes on disqualified person

In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) Prohibited transaction

(1) General rule

For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

* * *

(e) Definitions

* * *

(2) Disqualified person

For purposes of this section, the term "disqualified person" means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

* * *

(f) Other definitions and special rules

For purposes of this section—

* * *

(5) Correction

The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

* * *

(h) Notification of Secretary of Labor

Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

2. ERISA § 3, 29 U.S.C. § 1002, provides in part as follows:

§ 3. Definitions

For purposes of this title:

* * *

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer,

trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.[,]

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 [26 U.S.C. § 501(c)(22)] is permitted to make payments under section 4223 [29 U.S.C. § 1403] shall be treated as a party in interest with respect to such trust.

* * *

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 U.S.C. § 1105(c)(1)(B)].

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

3. ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), provides as follows:

§ 406. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 408 [29 U.S.C. § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C. § 1107(a)].

4. ERISA § 408(a), 29 U.S.C. § 1108(a), provides as follows:

§ 408. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) [29 U.S.C. §§ 1106, 1107(a)]. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) or 407(a) [29 U.S.C. §§ 1106(a) or 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) [29 U.S.C. § 1106(b)] unless he affords an opportunity for a hearing and makes a determination

on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

5. ERISA § 502(a), 29 U.S.C. § 1132(a), provides in part as follows:

> **§ 502. Civil enforcement**
>
> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;
>
> * * *
>
> (5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

6. ERISA § 502(i), 29 U.S.C. § 1132(i), provides as follows:

> **(i) Administrative assessment of civil penalty**
>
> In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such

> party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 4975(f)(4)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 U.S.C. § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 U.S.C. § 4975(e)(1)].